

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 00-16423

MICHAEL A. NEWDOW,

Plaintiff-Appellant,

v.

U.S. CONGRESS, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

**BRIEF AMICI CURIAE
IN SUPPORT OF PETITION OF THE UNITED STATES
FOR REHEARING AND REHEARING EN BANC**

IDAHO GOVERNOR DIRK KEMPTHORNE
IDAHO LIEUTANANT GOVERNOR JACK RIGGS, M.D.
UNITED STATES SENATOR LARRY CRAIG
UNITED STATES SENATOR MIKE CRAPO
UNITED STATES REPRESENTATIVE MIKE SIMPSON
UNITED STATES REPRESENTATIVE C.L. "BUTCH" OTTER

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I. IDENTITY OF AMICI CURIAE

Amici are Idaho's principal chief executives and the entire delegation to the United States Congress from the State of Idaho.

Amicus curiae Dirk Kempthorne is the duly-elected Governor of the State of Idaho and is a former United States Senator. As Idaho's Governor, he is required to "see that the laws are faithfully executed" in the state. IDAHO CONST. art. IV, § 5. As will be discussed below, Idaho has a statutory requirement that schoolchildren learn the Pledge of Allegiance to the flag of the United States.

Jack Riggs, M.D., is the Lieutenant Governor of the State of Idaho and President of the Idaho State Senate. In his capacity as Lieutenant Governor, he has acted as Idaho's Governor and on numerous occasions assumed the power of the chief executive under the Constitution of the State of Idaho. He is a former State Senator and presides over that legislative body as it conducts its daily business, including leading the State Senate in a prayer at the start of the Senate's daily session.

Amicus United States Senator Larry Craig is the senior Senator from the State of Idaho. Senator Craig has been a member of the United States Senate for nearly twelve years, and has begun his daily legislative business by reciting the Pledge of Allegiance on the Senate floor, as well as prayer led by the Chaplain of

the United States Senate. Prior to becoming a United States Senator, he was a member of the United States House of Representatives. He is also a former Idaho state legislator.

Amicus Mike Crapo also serves the people of Idaho as a United States Senator. Prior to being elected to the United States Senate, he was a member of the United States House of Representatives. He was elected to Congress after having served as the President Pro Tempore of the Idaho State Senate, again, a body of the legislative branch of Idaho government that begins each legislative day with a prayer. He also begins his legislative day on the floor of the United States Senate with the Pledge of Allegiance.

Amicus United States Representative Mike Simpson is the former Speaker of the Idaho House of Representatives. He served fourteen years as a state legislator and was elected Speaker of the House for three sessions of the Idaho Legislature. As Speaker, he presided over the Idaho House of Representatives in a daily prayer prior to the start of each legislative day of business, and in his present position, he begins his legislative day with the Pledge of Allegiance on the floor of the House of Representatives.

C.L. “Butch” Otter is also a member of the United States House of Representatives. Prior to being elected to Congress, Representative Otter was the

Lieutenant Governor of Idaho and performed the duties of acting Governor on numerous occasions. As Lieutenant Governor and President of the Senate for four four-year terms, he presided over a daily prayer in the Idaho State Senate. As a member of the House of Representatives, he also begins his daily legislative business with the Pledge of Allegiance.

II. INTEREST AND AUTHORITY OF AMICI CURIAE

Amici hail from the State of Idaho, a state which requires as a matter of its fundamental constitutional construct that no “preference be given by law to any religious denomination or mode of worship.” IDAHO CONST. art. I, § 4. As elected officials of state and federal government, the laws are entrusted to the Amici for their deliberate construction and lawful application.

Our Nation’s Founding Fathers declared independence from Great Britain by proclaiming to be ever mindful of man’s “equal station to which the Laws of Nature and of *Nature’s God* entitle them,” THE DECLARATION OF INDEPENDENCE (U.S. 1776) (emphasis added), and also professed that one of the self-evident truths is that such men “are endowed *by their Creator* with certain unalienable rights,” *id.*, para. 2 (emphasis added). Amici do not believe that the Founders intended that the Establishment Clause of the First Amendment would be offended over a century

and a half later when Congress inserted the words “under God” into the Pledge of Allegiance. *See* Pub. L. No. 396, Ch. 297, 68 Stat. 249 (1954).

Amici are vitally interested in maintaining the Pledge of Allegiance as an important part of the social and moral fabric of Idaho, a state which is immediately impacted by this case because it falls within the jurisdiction of the Ninth Circuit.

The Pledge of Allegiance plays an integral part of the citizenship education for children in Idaho public schools. Amici are familiar with the process by which federal laws are impressed upon on the states, and they understand that the words “under God” in the Pledge represent an important affirmation by Congress that the Framers of the Constitution never designed the United States to be a nation *void* of any acknowledgement of God in our public and free society.

The decision in this case, if it were to stand, will destabilize an important observance of Idaho’s heritage and culture, especially coming more than two centuries after the birth of a Republic in which its patriarchs freely evoked God in the many writings and organic documents which became the blueprint for the new Nation. Amici can offer a unique perspective on why this case should be reheard *en banc* and why the issues in the case are of the highest importance to Idaho and the United States.

III. SUMMARY OF ARGUMENT

The State of Idaho provides mandatory citizenship and patriotism education in its public schools. By operation of state law, Idaho affords the opportunity for its students to recite the Pledge of Allegiance, sing the National Anthem or “America the Beautiful” in a public school setting. IDAHO CODE § 33-1602(2) (Michie 2001). The holding in this case will invalidate essential components of Idaho’s mandatory citizenship curriculum.

This case involves a question of exceptional importance under Federal Rule of Appellate Procedure 35(b)(1)(B). In addition to Idaho, a significant majority of states comprising the United States have a statutory expression encouraging patriotism education in which the Pledge of Allegiance is an essential element. In some instances, states have enacted the Pledge with the words “under God” directly into their body of law. *En banc* review of this case is appropriate under Rule 35(b).

This case is also appropriate for *en banc* review under Circuit Rule 35-1 because it directly conflicts with a 1992 case from the United States Court of Appeals for the Seventh Circuit, *Sherman v. Community Consolidated School District 21 of Wheeling Township*, 980 F.2d 437 (7th Cir. 1992), *cert. denied*, 508 U.S. 950 (1993).

Accordingly, under Rule 35 and Circuit Rule 35-1, the instant decision substantially affects a rule of national application in which there is an overriding need for national uniformity and directly conflicts with an existing opinion of another court of appeals, and *en banc* review is warranted.

IV. ARGUMENT

A. Introduction: The Pledge of Allegiance and its Implication for Citizenship Education in the State of Idaho

The Preamble to the Constitution of the State of Idaho declares that “We, the people of the state of Idaho, *grateful to Almighty God* for our freedom, to secure its blessings and promote our common welfare do establish this Constitution.”

IDAHO CONST. preamble (emphasis added). As with the Nation’s Founding Fathers, so too did the framers of the Idaho Constitution acknowledge that its essential governmental infrastructure required divine intercession in order to ensure its success.

The California statute of record in this case¹ is a mirror image to an Idaho provision which requires patriotism education in all of the State’s elementary and secondary schools. Idaho Code section 33-1602 provides in part that:

1. The California statutory provision before the Court here provides that:

In every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity period at which

(Footnote continued next page . . .)

(2) Instruction in the proper use, display and history of and respect for the American flag and the national colors *shall be given* in all elementary and secondary schools. Such instruction *shall* include the pledge of allegiance to the flag, the words and music of the national anthem, and of “America.”

. . .

(4) Every public school *shall* offer the pledge of allegiance or the national anthem in grades one (1) through twelve (12) at the beginning of each school day.

IDAHO CODE § 33-1602(2), (4) (Michie 2001) (emphasis added).

However, mindful that the Idaho Constitution prohibits any marginalization of an individual’s “right, privilege, or capacity on account of his religious opinions,”

IDAHO CONST. art. I, § 4, the statute further provides that “No pupil shall be compelled, against the pupil’s objections or those of the pupil’s parent or guardian, to recite the pledge of allegiance or to sing the national anthem.” IDAHO CODE § 33-1602(5) (Michie 2001); *see also West Virginia State Board of Education v.*

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the majority of the pupils of the school normally begin the schoolday, there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section. In every public secondary school there shall be conducted daily appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy such requirement. Such patriotic exercises for secondary schools shall be conducted in accordance with the regulations which shall be adopted by the governing board of the district maintaining the secondary school.

CAL. EDUC. CODE § 52720 (West 1989).

Barnett, 319 U.S. 624 (1943) (stating children may not be compelled to salute the flag and recite the Pledge as a prerequisite to public school attendance). Thus, even with Idaho's strong public policy that her young people be well-grounded and learned in the Nation's founding principles, that same policy provides an equally strong and appropriate religious and philosophical accommodation to those who may object to having to recite the Pledge or sing the National Anthem.

The practical impact of Idaho's current citizenship curriculum in elementary and secondary schools is that (if they so choose), young people throughout the state begin each day with some acknowledgment of a divine nexus for the creation and protection of our country. In addition to perhaps reciting "one nation, under God" in the Pledge of Allegiance, some Idaho schoolchildren may fulfill their patriotic curriculum requirement under Idaho Code section 33-1602 by singing the words and music of the National Anthem,² or "America the Beautiful."³

2. The Star Spangled Banner's third verse reads:

Oh! thus be it ever, when freemen shall stand
Between their loved homes and the war's desolation!
Blest with victory and peace, may the heaven-rescued land
Praise the Power that hath made and preserved us a nation.
Then conquer we must, for our cause it is just,
And this be our motto: "*In God is our trust*"

(Footnote continued next page . . .)

The tautological consequence of this case is that each of the options expressly afforded in Idaho's classrooms to teachers and students for education in the heritage of the United States is effectively *unavailable*.⁴ This cannot be a correct result under the First Amendment because "[t]he people of the United States did not adopt the Bill of Rights in order to strip the public square of every

(. . . footnote continued from previous page)

And the star-spangled banner forever shall wave
O'er the land of the free and the home of the brave!

FRANCIS SCOTT KEY, STAR SPANGLED BANNER (Sept. 20, 1814) (emphasis added).

3. The first chorus to "America" is sung, "America! America! *God* shed His grace on thee." The second chorus is sung, "America! America! *God* mend thine every flaw." The third chorus is: "America! America! May *God* thy gold refine." The fourth and final chorus is identical to the first. KATHERINE LEE BATES, AMERICA THE BEAUTIFUL (1913) (emphasis added).
4. One irony of the Court's decision is that Idaho school children could now be forced to seek refuge in *religious* schools to recite the Pledge of Allegiance enacted by Congress and receive and engage in the citizenship curriculum required under title 33, section 1602.

However, Idaho school districts are also afforded the opportunity to set forth their particular policies regarding religious practices, as exemplified by the following pronouncement from the Boise City School District:

The District shall respect the right of each individual to follow his/her own beliefs, as long as the beliefs do not infringe upon the rights of others or disrupt the educational process. Information about various religions may be made available to students as appropriate to the students' grade level and course of study. Any discussion or study of religion or other beliefs shall be offered in a fair and objective manner, consistent with learning objectives and free from sectarian influence.

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last shred of public piety.” *Chaudhuri v. State of Tennessee*, 130 F. 3rd 232, 236 (6th Cir. 1997), *cert. denied*, 523 U.S. 1024 (1998).

B. This Case Is Appropriate for *En Banc* Review under Rule 35 of the Federal Rules of Appellate Procedure and the Circuit Rules

1. This Case Involves a Question of Exceptional Importance Under Federal Rule of Appellate Procedure 35(b)(1)(B)

While *en banc* review is “not favored,” FED. R. APP. P. 35(a), such review is appropriate where the case “involves a question of exceptional importance.” FED. R. APP. P. 35(b)(1)(B).

How the 1954 version of the Pledge of Allegiance has become eternally woven into the social fabric of Idaho has already been described. However, many of the states within the Ninth Circuit, in addition to California and Idaho, have similar statutory requirements for public school patriotism education which includes recitation of the Pledge of Allegiance.⁵

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INDEPENDENT SCHOOL DISTRICT OF BOISE CITY, POLICIES AND ADMINISTRATIVE PROCEDURES NUMBER 2190 (Rev. August, 2001).

5. Alaska directs the “governing body” of public schools to “require that the [P]ledge of [A]llegiance be recited regularly,” and that if the version of the Pledge under 4 U.S.C. section 4 is not recited, the person may “maintain a respectful silence.” ALASKA STAT. § 14.03.130(a) (Michie 2000). Arizona requires school authorities to “set aside a specific time each day for those students who wish to recited the [P]ledge of [A]llegiance to the United States [F]lag.” ARIZ. REV. STAT. § 15-506 (West 2002). Montana Code section 20-7-133 states that the Pledge “must be

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Outside of the Ninth Circuit, the importance of a single federal appellate court deciding that the 1954 amendment to the Pledge is unconstitutional becomes more pronounced. A significant majority of the states within the Union have enacted laws which are now in question due to the constitutional command of this case.⁶ Some

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recited in all public schools of the State,” with any student having the option to be excused from participation. MONT. CODE ANN. § 20-7-133 (2001). Nevada requires each public school to “set aside appropriate time at the beginning of each school day for pupils to pledge their allegiance to the [F]lag of the United States.” NEV. REV. STAT. § 389.040 (2002). School boards in the State of Washington “shall cause appropriate flag exercises to be held in each classroom at the beginning of the school day,” which such exercises include the Pledge of Allegiance as set forth in 4 U.S.C. section 4 and, if “feasible,” the National Anthem. WASH. REV. CODE § 28A.230.140 (2000). Students can recite the Pledge if they desire, but they are required to maintain “a respectful silence” if they decide not to participate in the flag exercises. *Id.*

6. *See, e.g.,* Alabama, ALA. CODE 1975 § 16-43-5 (West 2001) (students to be afforded opportunity to voluntarily recite Pledge of Allegiance to United States Flag); Arkansas, ARK. CODE ANN. § 6-16-122 (Michie 1999) (Pledge of Allegiance as part of American heritage education in public schools); Illinois, 105 ILL. COMP. STAT. 5/27-3 (West 1998) (requiring the Pledge of Allegiance to be recited in elementary schools). *See also* 2002 Ill. Legis. Serv. P.A. 92-612 (S.B. 1634) (West 2002) (amending section 27-3 to include recital of the Pledge of Allegiance in secondary, as well as elementary schools); Indiana, IND. CODE § 20-10.1-4-2.5 (2002 Electronic Pocket Part Update) (protected writings under state law includes the Pledge of Allegiance); Kansas, KAN. STAT. ANN. § 72-5308 (1992) (daily recitation of the Pledge of Allegiance); Kentucky, KY. REV. STAT. ANN. § 158.175(1) (Michie 2001) (authorization of Pledge of Allegiance in public schools); Louisiana, LA. REV. STAT. ANN. § 17:2115 (West 2001) (Pledge of Allegiance recited at first class of each school day); Massachusetts,

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states, as a testament to the durability of the language of the Pledge since 1954, and relying on the authority of Congress to enact constitutional legislation accommodating of the Establishment Clause, have enshrined the full and complete language of the Pledge into their own state law.⁷

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MASS. ANN. LAWS ch. 71, § 69 (Law. Co-op. Supp. 2000) (teacher shall lead pupils in Pledge the first class of each day); New Hampshire, N.H. REV. STAT. § 194:15-c (enacted 2002 New Hampshire Laws ch. 277 (H.B. 1446)) (the New Hampshire School Patriot Act, effective July 17, 2002, authorizing a period each day to recite the Pledge); New Mexico, N.M. STAT. ANN. § 22-5-4.5 (Michie 2001) (Pledge of Allegiance recited daily in each public school); New York, N.Y. EDUC. LAW § 802 (McKinney 2000) (daily Pledge of Allegiance in public schools); North Carolina, N.C. GEN. STAT. § 115C-47(29a) (2002) (providing for age-appropriate instruction on the Pledge and opportunity to recite it); North Dakota, N.D. CENT. CODE § 15.1-19-03.1 (Supp. 2001) (voluntary recitation of Pledge of Allegiance at the beginning of each school day); Ohio, OHIO REV. CODE ANN. § 3313.602 (West Supp. 2002) (establishing policy on the oral recitation of the Pledge of Allegiance); South Dakota, S.D. CODIFIED LAWS § 13-24-17.2 (added by S.L. 2002, ch. 87, § 1) (right to recite Pledge of Allegiance not to be infringed); Tennessee, TENN. CODE ANN. § 49-6-1001(c)(1) (2002 Tennessee Laws Pub. Acts ch. 841 (S.B. 2599)) (effective July 3, 2002, requiring daily recitation of Pledge of Allegiance); Utah, UTAH CODE ANN. § 53A-13-101.6 (2000) (Pledge recited at beginning of each day in elementary schools); Virginia, VA. CODE ANN. § 22.1-202 (Supp. 2002) (daily Pledge of Allegiance to American Flag); West Virginia, W. VA. CODE § 18-5-15b (1999) (public school instructional days to begin with Pledge of Allegiance); and Wisconsin, WIS. STAT. ANN. § 118.06 (West Supp. 2002 Electronic Update) (Pledge of Allegiance offered in grades one through twelve each school day).

7. *See, e.g.,* Delaware, DEL. CODE ANN. tit. 14 § 4105 (Michie 1999). *See also,* Florida, FLA. STAT. ch. 1003.44 (amended 2002 Fla. Laws ch. 2002-387 (S.B. No. 20-E)); Maryland, MD. CODE ANN., EDUC. § 7-105(c)(3) (West 2002); Mississippi, MISS. CODE ANN. § 37-13-7 (2001); New Jersey, N.J. STAT. ANN. § 18A:36-3(c) (West 1999); Oklahoma, OKLA. STAT. ANN. tit. 70 § 24-106 (West 2002 Electronic Update) (incorporation by reference 4 U.S.C. § 4); Rhode

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The impact of the instant decision will undoubtedly reverberate beyond the Ninth Circuit and into the national jurisprudence. Rehearing will bring certainty and finality to an important legal issue of national import, and, accordingly, the case fits well within the criteria of Federal Rule of Appellate Procedure Rule 35(b)(1)(B) for *en banc* review.

2. This Case Directly Conflicts With an Existing Opinion by Another Court of Appeals Thus Warranting *En Banc* Review

It is not surprising that since Congress amended the Pledge of Allegiance in 1954, federal courts have entertained Establishment Clause challenges to that legislative act.⁸ It is stunning that this Court would see fit to belatedly hold that the First Amendment has *just now* been violated in the almost half a century which has

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Island, R.I. GEN. LAWS 1956 § 16-22-11(a) (2001); South Carolina, S.C. CODE ANN. § 59-1-455 (West Supp. 2000).

8 . A California *district court* long ago dismissed a challenge similar to that presented here in *Smith v. Denney*, 280 F.Supp. 651 (E.D. Ca. 1968).

transpired since Congress originally acted.⁹ The Supreme Court recently hesitated to revisit a long-standing constitutional justification for the *Miranda* warnings because they have “become part of our national culture.” *Dickerson v. United States*, 530 U.S. 428, 443 (2000). This Court should be as equally reluctant to examine the legitimacy of a congressional event which occurred in 1956 - an even *later* hour than *Miranda v. Arizona*, 384 U.S. 436 (1966) - and which perhaps has become an even more inherent part of our national tradition after the events which occurred on September 11, 2001.

But as duly noted by Petitioner United States, in an almost identical case decided a decade ago, the Seventh Circuit in *Sherman v. Community Consolidated School District 21 of Wheeling Township*, 980 F.2d 437 (7th Cir. 1992), *cert. denied*, 508 U.S. 950 (1993), held that the Establishment Clause accommodated a

9. In rejecting an Establishment Clause challenge to the Ohio state motto “With God All Things are Possible,” the Sixth Circuit recently noted that:

We should also be *amazed* if the Supreme Court were now to question the constitutionality of the Act of June 14, 1954 (68 Stat. 249) , codified at [4 U.S.C. § 4]. That is the statute, enacted two years before enactment of Ohio’s motto statute, in which Congress, taking a leaf from the Gettysburg Address, amended the Pledge of Allegiance by inserting the phrase “under God” between “one Nation” and “indivisible.”

American Civil Liberties Union of Ohio v. Capitol Square Review and Advisory Board, 243 F.3d 289, 301 n.10 (6th Cir. 2001) (*en banc*) (emphasis added).

1979 Illinois statute which required that the Pledge of Allegiance be led by teachers, provided that the students were free to not participate. Because this case is inapposite to *Sherman*, it “conflicts with the authoritative decision[] of other United States Courts of Appeals that have addressed the issue” under Federal Rule of Appellate Procedure 35(b)(1)(B).

Additionally, under Circuit Court Rule 35-1, *en banc* review is warranted if the panel opinion “directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of *national* application in which there is an overriding need for *national* uniformity.” CIRCUIT RULE 35-1 (emphasis added). The circumstances of this case - involving our *national* Pledge of Allegiance and combined with the years of state statutory infrastructure requiring its recitation in public schools *throughout the country* - cannot provide a more appropriate illustration of the circumstances triggering *en banc* review under Circuit Rule 35-1.

V. CONCLUSION

For the reasons set forth above the Court should order *en banc* review the above-entitled case.

DATED: August 16, 2002

L. MICHAEL BOGERT

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of August, 2002, I served the foregoing Brief Amici Curiae in Support of Petition of the United States for Rehearing and for Rehearing En Banc on the following persons by causing two copies of the brief to be delivered to Federal Express for next-day delivery:

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